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MAY 27 2008

**OFFICE OF PETITIONS**

In re Application of  
Robert J. Bernardi et al.  
Application No. 09/854,172  
Filed: May 11, 2001  
Attorney Docket No. 18864-  
06052US  
Title: AUTO-ADJUST NOISE  
CANCELING MICROPHONE WITH  
POSITION SENSOR

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: DECISION ON RENEWED  
: PETITION PURSUANT TO  
: 37 C.F.R. § 1.181(A)  
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BACKGROUND

This is a decision on the renewed petition pursuant to 37 C.F.R. § 1.181(a), filed November 21, 2007, to withdraw the holding of abandonment.

This renewed petition is **DISMISSED**.

The above-identified application became abandoned for failure to submit the issue and publication fees in a timely manner in reply to the Notice of Allowance and Issue Fee Due, mailed April 24, 2007, which set a shortened statutory period for reply of three months. No extensions of time are permitted for transmitting issue fees<sup>1</sup>. Accordingly, the above-identified application became abandoned on July 25, 2007. A Notice of Abandonment was mailed on August 17, 2007.

An original petition was filed on August 28, 2007, which was dismissed via the mailing of a decision on October 1, 2007, as the documentation that Petitioner submitted did not appear to be electronically reproducible.

<sup>1</sup> See MPEP § 710.02(e).

RELEVANT PORTION OF THE MPEP

Section 711.03(c)(I)(A) sets forth, in toto:

In *Delgar v. Schulyer*, 172 USPQ 513 (D.D.C. 1971), the court decided that the Office should mail a new Notice of Allowance in view of the evidence presented in support of the contention that the applicant's representative did not receive the original Notice of Allowance. Under the reasoning of *Delgar*, an allegation that an Office action was never received may be considered in a petition to withdraw the holding of abandonment. If adequately supported, the Office may grant the petition to withdraw the holding of abandonment and remail the Office action. That is, the reasoning of *Delgar* is applicable regardless of whether an application is held abandoned for failure to timely pay the issue fee ( 35 U.S.C. 151) or for failure to prosecute ( 35 U.S.C. 133).

To minimize costs and burdens to practitioners and the Office, the Office has modified the showing required to establish nonreceipt of an Office action. The showing required to establish nonreceipt of an Office communication must include a statement from the practitioner describing the system used for recording an Office action received at the correspondence address of record with the USPTO. The statement should establish that the docketing system is sufficiently reliable. It is expected that the record would include, but not be limited to, the application number, attorney docket number, the mail date of the Office action and the due date for the response.

Practitioner must state that the Office action was not received at the correspondence address of record, and that a search of the practitioner's record(s), including any file jacket or the equivalent, and the application contents, indicates that the Office action was not received. A copy of the record(s) used by the practitioner where the non-received Office action would have been entered had it been received is required.

A copy of the practitioner's record(s) required to show non-receipt of the Office action should include the master docket for the firm. That is, if a three month period for reply was set in the nonreceived Office action, a copy of the master docket report showing all replies docketed for a date three months from the mail date of the nonreceived Office action must be submitted as documentary proof of nonreceipt of the Office action. If no such master docket exists, the practitioner should so state and provide other evidence such as, but not limited to, the following: the application file jacket; incoming mail log; calendar; reminder system; or the individual docket record for the application in question.

The showing outlined above may not be sufficient if there are circumstances that point to a conclusion that the Office action may have been lost after receipt rather than a conclusion that the Office action was lost in the mail (e.g., if the practitioner has a history of not receiving Office actions).

Decision on Renewed Petition pursuant to 37 C.F.R. § 1.181(a)

Evidence of nonreceipt of an Office communication or action (e.g., Notice of Abandonment or an advisory action) other than that action to which reply was required to avoid abandonment would not warrant withdrawal of the holding of abandonment. Abandonment takes place by operation of law for failure to reply to an Office action or timely pay the issue fee, not by operation of the mailing of a Notice of Abandonment. See *Lorenz v. Finkl*, 333 F.2d 885, 889-90, 142 USPQ 26, 29-30 (CCPA 1964); *Krahn v. Commissioner*, 15 USPQ2d 1823, 1824 (E.D. Va 1990); *In re Application of Fischer*, 6 USPQ2d 1573, 1574 (Comm'r Pat. 1988).

### ANALYSIS

With the original petition, Petitioner included a statement that a thorough search of the file jacket and docket records was conducted, and that the relevant Office communication was not located.

With this renewed petition, Petitioner has submitted an electronically reproducible copy of the records used by Petitioner, where the non-received Office action would have been entered had it been received.

The showing with this renewed petition cannot be granted, for the following two reasons.

First, Petitioner has neither submitted a master docket for the firm, as defined in the portion of the MPEP reproduced above, nor has he stated that no such master docket exists.

Second, the individual docket record for the application that was provided with this renewed petition has been reviewed by the undersigned, and the records do not appear to be complete. Petitioner has included what appears to be a screen shot of a computerized docketing system that is associated with this particular application. Petitioner has submitted a copy of the screen that shows only the "outstanding actions," and it is clear that the relevant Office communication does not appear on this screen. However, there is also a tab entitled "all actions," and this tab was not selected. As such, it appears that this docketing system allows the user to review a list of all actions that are/were associated with this application, but Petitioner has not provided a copy of this screen shot. As such, Petitioner's submission is incomplete.

On second renewed petition, Petitioner should provide either a copy of the master docket, or state that no such master docket exists. Additionally, Petitioner should include an

electronically reproducible copy of the "all actions" screen shot.

### CONCLUSION

Any reply must be submitted within **TWO MONTHS** from the mail date of this decision. Extensions of time under 37 C.F.R. § 1.136(a) are permitted. The reply should include a cover letter entitled "Second Renewed Petition pursuant to 37 C.F.R. § 1.181(a)." This is not a final agency action within the meaning of 5 U.S.C § 704.

The second renewed petition should indicate in a prominent manner that the attorney handling this matter is Paul Shanoski, and may be submitted by mail<sup>2</sup>, hand-delivery<sup>3</sup>, or facsimile<sup>4</sup>. Registered users of EFS-Web may alternatively submit a response to this decision via EFS-Web<sup>5</sup>. Alternatively, Petitioner may submit a petition pursuant to 37 C.F.R. §§ 1.137(a) and/or (b).

If responding by mail, Petitioner is advised not to place the undersigned's name on the envelope. Only the information that appears in the footnote should be included - adding anything else to the address will delay the delivery of the response to the undersigned.

Telephone inquiries **regarding this decision** should be directed to the undersigned at (571) 272-3225<sup>6</sup>. All other inquiries concerning examination procedures or status of the application should be directed to the Technology Center.

/Paul Shanoski/  
Paul Shanoski  
Senior Attorney  
Office of Petitions

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2 Mail Stop Petition, Commissioner for Patents, United States Patent and Trademark Office, P.O. Box 1450, Alexandria, VA, 22313-1450.

3 Customer Window, Randolph Building, 401 Dulaney Street, Alexandria, VA, 22314.

4 (571) 273-8300- please note this is a central facsimile number.

5 <https://sportal.uspto.gov/authenticate/authenticateuserlocalepf.html>

6 Petitioner will note that all practice before the Office should be in writing, and the action of the Office will be based exclusively on the written record in the Office. See 37 C.F.R. § 1.2. As such, Petitioner is reminded that no telephone discussion may be controlling or considered authority for any further action(s) of Petitioner.